U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 March 2006

BALCA Case No.: 2005-INA-38
ETA Case No: P2002-CA-09528431/JS

In the matter of:

SOUTHWEST GROWERS LANDSCAPING, INC.,
Employer,

on behalf of

JOSE BELTRAN,
Alien.

Appearance: John Lamrock, *Pro Se*
Huntington Beach, California
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**[1]
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Southwest Growers Landscaping, Inc. ("the Employer") filed an application for labor certification[2] on behalf of Jose Beltran ("the Alien") on March 29, 2001. (AF 16).[3] The

[1] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

[2] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

Employer seeks to employ the Alien as a machine operator (golf course construction, management and nursery). This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R § 656.27(c).

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as mowing and trimming lawns, using manual and power operated equipment; planting new and repairing established lawns; trimming shrubs and cultivating gardens; and cleaning grounds. The Employer required no education, but required three months of experience in the job offered. (AF 16).

In the Notice of Findings ("NOF"), issued September 4, 2003, the CO found that the Employer failed to document job-related reasons for the rejection of U.S. workers as required by 20 C.F.R. § 656.21(b)(6). (AF 10-11). The CO noted that the Employer was forwarded applications of three qualified U.S. workers on June 26, 2002. The Employer attempted to contact each U.S. applicant by telephone on July 11, 2002, leaving messages stating that interviews were scheduled for July 15, 2002. Two applicants were rejected after contacting the Employer and after failing to appear at rescheduled interview dates. One applicant, Mr. Saxton, was rejected for failing to attend the interview and failing to contact the Employer. (AF 11).

The CO found that the Employer untimely contacted the three U.S. applicants and that the Employer provided insufficient documentation of its attempted contact with each applicant. The CO further found that the Employer should have made more than one attempt to contact the applicants. The NOF suggested that the Employer submit documents to demonstrate how each applicant was recruited in good faith and rejected for lawful, job-related reasons. With regard to the attempted contact of U.S. Applicant Saxton, the NOF suggested that the Employer submit a phone bill, along with information concerning the content of the message left for him. (AF 12).

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[3] In this decision, "AF" is an abbreviation for "Appeal File."

In the NOF, the CO also found that the Employer failed to comply with the regulations at 20 C.F.R. §§ 656.21(g)(1) through (9). (AF 12). The CO determined that the Employer advertised the available job position as "Machine Operator," which may have been misleading and resulted in placement of the advertisement under the letter "M" rather than the letter "L." Accordingly, the CO concluded that the Employer did not adequately describe the job to test the labor market. The CO suggested that the Employer indicate a willingness to readvertise the job under "landscape" or "landscape gardener" and that the Employer submit a draft advertisement reflecting the amended requirements. (AF 13).

In rebuttal dated September 11, 2003, the Employer stated that it did not receive the resumes of the three applicants until June 28, 2002, and contended that it timely contacted the applicants within a "legal" fourteen day period. The Employer further contended that it contacted the applicants more than one time, but the applicants failed to attend the interviews. The Employer indicated a willingness to retest the labor market with the suggested revisions and submitted a draft advertisement. (AF 7).

On November 21, 2003, a Final Determination ("FD") was issued in which the CO found that the Employer remained in violation of 20 C.F.R. § 626.21(b)(6). (AF 5-6). The CO stated that there is no "legal limit" for contacting U.S. workers, as such contact is to occur as soon as possible. The CO further stated there was no basis for delaying contact with U.S. applicants because the gardener position was local and there were few applicants.[4] Additionally, the CO found that the rebuttal did not document the content of the Employer's phone messages and determined that the Employer should have made more than one attempt to contact an applicant after leaving a message on an answering machine. (AF 6). With regard to U.S. Applicant Saxton, the CO stated that the Employer failed to document the message left for the U.S. worker and failed to document a good faith effort to recruit him. (AF 6).

[4] The FD initially stated that the Employer petitioned for a gardener with two years' experience. The FD later noted that U.S. Applicant Saxton was a qualified applicant with "more than three months' experience in the occupation." (AF 16). A review of the labor certification application and the Appeal File shows that the Employer actually sought a worker with **three months** experience.

On December 17, 2003, the Employer requested review of the denial and this matter was docketed by the Board of Alien Labor Certification Appeals ("Board") on December 9, 2004. (AF 1).

DISCUSSION

According to 20 C.F.R. § 656.21(b)(6), an employer must document that U.S. workers who have applied for the job opportunity were rejected solely for lawful, job-related reasons. This applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. According to 20 C.F.R. § 656.20(c)(8), the job opportunity must be clearly open to any qualified U.S. worker.

Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1978-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In the instant case, the CO challenged the Employer's good faith recruitment of U.S. workers. The burden of proof is on the employer in any alien labor certification application. 20 C.F.R. § 656.21(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996). Thus, it is the employer's burden to demonstrate good faith in recruitment and show that U.S. workers are not able, willing, qualified, or available for this job opportunity.

An employer remains under an affirmative duty to commence review and make all reasonable attempts to contact applicants as soon as possible. *Creative Cabinet & Store Fixture, Co.*, 1989-INA-181 (Jan. 24, 1990) (*en banc*). The standard for whether recruitment is timely was set forth in *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991) (*en banc*). In that case, the Board determined that the "as soon as possible" standard does not embody a specific time

limit. It turns on how long an employer requires for a reasonable examination of the applicant's credentials, including, but not limited to the following factors: (a) whether the position requires extensive or minimal credentials; (b) whether the recruitment is local; and (c) whether many or only a few persons applied for the position.

In the present case, the Employer contended that it actually received notification of the three U.S. applicants on June 28, 2002, rather than June 26, 2002, as alleged in the NOF. The Employer further contended that its contact with the U.S. applicants was timely due to intervening weekends. Nonetheless, as noted in the FD, the Employer required a worker with only three months' experience and sought to fill a position that was local in nature. When these two factors are considered, along with the fact that the Employer received only three applications, the Employer's delay before attempting contact with the U.S. applicants is not reasonable, even assuming it was a twelve day delay as Employer contends.

Additionally, the CO determined that the Employer did not sufficiently document the content of the phone messages left for the U.S. applicants and that it should have made more than one attempt at contact with the applicants. With regard to U.S. Applicant Saxton, the CO specifically found that the Employer did not document the message left or its good faith recruitment efforts.

The Board in *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*), *citing Gencorp*, 1987-INA-659 (Jan.13, 1988) (*en banc*), noted that, although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. To document initial or follow-up telephone conversations, the Board in *M.N. Auto Electric*, *supra*, instructed:

> an employer must, at minimum, keep reasonably detailed notes on the conversation (e.g., when the call was made, how long it lasted, whether there was a successful contact with the applicant, the substance of the conversation. Prepared checklists may be helpful in documenting what was discussed with the applicants.) Where available, phone records showing the time and duration of the phone contacts should be admitted by Employer.

The need to do more than make a single telephone call has been well-established by the Board. *Fort Meyer Construction Corp.*, 2003-INA-117 (June 22, 2004), *citing*, *Bruce A. Fjeld*, 1988-INA-333(May 26, 1989) (*en banc*).

The NOF did state that two U.S. applicants returned the Employer's phone calls and failed to attend rescheduled interviews. Although this arguably may be sufficient to show a good faith effort at recruitment of those two workers, the NOF found that the Employer did not sufficiently document the content of the Employer's phone messages and how the applicants were "sufficiently informed of the nature of the interview." (AF 12). In its rebuttal, the Employer simply stated that all applicants were contacted more than one time, but it did not provide any additional information regarding the dates and times of the alleged contacts, with whom the Employer spoke, or the content of any messages or conversations. With regard to the attempted contact of U.S. Applicant Saxton, the Employer failed to provide any additional specifics or documentation, and it did not include a phone bill documenting the attempted contact, as requested in the NOF. Without more detail regarding the attempted contacts and messages, we conclude that the Employer did not rebut the CO's findings.

Based on the foregoing, we conclude the Employer has not met its burden to show that it made a good faith effort to recruit the qualified U.S. workers, and labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.